Supreme Court, U.S.
FILED
OCT 17 1995
OFFICE OF THE CLERK

(1)

No. 95-630

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

Respondent,

v.

FRANK L. BAIRD

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Does an administrative forfeiture of an individual's property constitute punishment under the Double Jeopardy Clause when a judicial forfeiture of the same property for identical reasons constitutes punishment?

LIST OF PARTIES

The caption contains the names of all the parties in the lower courts.

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No. 95-

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

Respondent,

v.

FRANK L. BAIRD

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Frank L. Baird, by his attorneys, Richard S. Wasserbly and Stuart Wilder, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 63 F.3d 1213 and is reprinted in the Appendix hereto, p. 1a, *infra*. The order of the Court of Appeals is reprinted in the Appendix hereto, p. 34a, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Pennsylvania has not been reported. It is reprinted in the Appendix hereto, p. 33a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1995. A Petition for Rehearing was denied on September 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTED

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The provisions of 21 U.S.C. §881(a)(4)-(7) are reproduced at App., *infra*, 37a.

STATEMENTOF THE CASE

1. A criminal complaint in this matter was filed on April 22, 1994. The initial Indictment was filed on May 18, 1994, and a superseding Indictment was filed on August 24, 1994 charging various violations of the Controlled Substances Act

under 21 U.S.C. §§841, 846, 860, 856 and 924(c)(1) related to the manufacture of 3,4-methylenedioxy-methamphetamine ("MDMA").

These charges arose following a search and seizure on April 20, 1994 conducted by law enforcement officers of Mr. Baird's house pursuant to a search warrant. At the time of the search and seizure, Mr. Baird was arrested. In the course of the search, seizure and arrest of Mr. Baird, law enforcement officers from the U.S. Department of Justice's Drug Enforcement Administration ("DEA"), seized, *inter alia,* $2,582 in currency scattered about Mr. Baird's bedroom. The law enforcement official who seized the money observed nothing which led him to believe that it belonged to anyone else. The government considered this money evidence of Mr. Baird's criminal acts and on May 11, 1994, the Assistant United States Attorney prosecuting Mr. Baird directed the DEA to preserve these funds for use against Mr. Baird at trial. The money, however, was forfeited and deposited into the treasury. On May 27, 1994, nine (9) days after the filing of the original indictment, the Drug Enforcement Administration, a branch of the Department of Justice, filed and served on Mr. Baird a Notice of Seizure for Forfeiture of the $2,582 U.S. Currency. The Notice of Seizure was sent to Mr. Baird as the party who was believed to have a legal or possessory interest in the property. The Notice claimed that the property was used or acquired as a result of a drug related offense and, consequently, subject to forfeiture pursuant to 21 U.S.C. §881. The record does not show, nor did the government assert, that anyone else had an interest in the property or that notice by any means other than publication was afforded to anyone but Mr. Baird.

Mr. Baird did not contest the forfeiture. Pursuant to operation of the law set out in 19 U.S.C. §1609, as incorporated

by 21 U.S.C. §881(d), the property on July 15, 1995, was forfeited to the United States. The Declaration of Forfeiture itself states that the forfeited property belonged to Frank Baird.

Mr. Baird filed a Motion to Dismiss on double jeopardy grounds, which was heard by the Honorable J. Curtis Joyner of the United Stated District Court for the Eastern District of Pennsylvania on February 23, 1995. On March 13, 1995, Judge Joyner denied Mr. Baird's Motion to Dismiss. Mr. Baird filed an interlocutory appeal from this Order on March 14, 1995. On March 17, 1995, the Court of Appeals for the Third Circuit stayed the impending trial. Mr. Baird has been incarcerated since the day of his arrest.

2. On August 11, 1995, a divided three judge panel of the Third Circuit affirmed the District Court's holding that the administrative forfeiture of Mr. Baird's money was not "punishment" under the Double Jeopardy Clause, and even if it was, Mr. Baird's failure to contest the forfeiture foreclosed any claim that the seizure of the money punished him. The panel majority first ruled that administrative forfeitures, unlike civil forfeitures, *i.e.* forfeitures that occur following the initiation of judicial process, are "non-proceedings." Administrative forfeitures like that which befell Mr. Baird, depriving him of money seized from him and over which there is no dispute regarding its ownership, "are merely the result of no one having come forward to claim the property seized or contest its forfeitability." App., *infra* at 10a. Therefore, even though it accepted the Ninth Circuit's holding in *United States v. $405,809.23 in United States Currency*, 33 F.3d 1210, 1218-22 (9th Cir.), *amended and reh den.*, 56 F.3d 41 (9th Cir. 1995), *pet. for cert. filed* 64 U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-346), that prior holdings of this Court require the conclusion that "civil" forfeitures are punishment under the Double Jeopardy

Clause, "administrative" forfeitures cannot be accorded the same status. App., *infra* at 10a.

Secondly, the panel majority held that because the administrative forfeiture which befell Mr. Baird did not entail a judicial proceeding, he was not placed in jeopardy. Because he did not contest the forfeiture of his money, Mr. Baird was not a party to any proceeding to which jeopardy attached. App., *infra* at 11a. Citing *Serfass v. United States,* 420 U.S. 377, 388 (1975), the court deemed a trial or other judicial proceeding a prerequisite to the invocation of the Double Jeopardy Clause as a barrier to another prosecution or penalty. App., *infra* at 12a. Not having been a "party" to any "proceeding", Mr. Baird could not claim that his impending trial placed him at risk of successive punishment. App., *infra* at 13a. Because this Court's decisions in *United States v. Halper,* 490 U.S. 435 (1989), *Austin v. United States,* ___U.S.___, 113 S.Ct. 2801 (1993) and *Montana Department of Revenue v. Kurth Ranch,* ___U.S.___, 114 S.Ct. 1937 (1994) had never explicitly added administrative forfeitures to the (short) list of fines, taxes and forfeitures which this Court has explicitly placed into the universe of constitutionally recognized "punishment", the panel majority held that Mr. Baird had not been punished when the government took his money.

One Judge dissented from the panel's opinion. Judge Sarokin found that *Halper, Austin,* and *Kurth Ranch* lead to the conclusion that judicial forfeitures under 21 U.S.C. §881(a)(6) constitute punishment under the Double Jeopardy Clause and administrative forfeitures under the same statute, such as the one which befell Mr. Baird, are also punishment. App., *infra* at 24a. Answering a question left open by *Kurth Ranch* and citing decisions from several other circuits, including *United States v. Ursery,* 59 F.3d 568 (6th Cir. 1995), *pet. for cert. filed* 64

U.S.L.W. 3161 (U.S. Aug. 28, 1995) (No. 95-345) Judge Sarokin stated that the sequence of the proceedings had no bearing on whether administrative forfeiture counted as punishment. App., *infra* at 24a-25a. Judge Sarokin would not require a defendant to have made a claim of ownership to property prior to its administrative forfeiture, allowing defendants with no legal basis to contest an administrative forfeiture to acquiesce in their punishment. Such a defendant, however, would have to prove that the administrative forfeiture at issue punished him. App., *infra* at 28a-31a.[1] For example, Judge Sarokin would require such a defendant to establish that the forfeiture was punitive, and not remedial, as in the case of the seizure of drugs or guns of an inherently illegal nature. App., *infra* at 31a. Judge Sarokin forewent an expanded discussion of the issues such an examination would raise. App., *infra* at 32a.

REASONS FOR GRANTING THE PETITION

The Double Jeopardy Clause of the Fifth Amendment provides that no one may "be subject for the same offence to be twice put in jeopardy of life or limb." As this Court has long held, this Clause affords various forms of protection against the government placing a person at risk of punishment more than once for the same offense. *Ex parte Lange,* 85 U.S. (18 Wall.) 163 (1974). In the face of direct challenge to the correctness of

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[1]Judge Sarokin also expressed concern that defendants would forego the right to challenge an administrative forfeiture of their property in order to preserve their right against self-incrimination. He would solve that problem by making any testimony by the defendant inadmissible at trial, the same as if offered during the course of a suppression hearing. App., *infra* at 26a.

this analysis from Justices Scalia and Thomas,[2] this Court has strongly and repeatedly reaffirmed the view, adopted over 120 years ago, that the Double Jeopardy Clause protects not only against further prosection for the same offense after acquittal or conviction, but also directly against multiple punishments for the same offense if not imposed in a single proceeding. *Witte v. United States*, 515 U.S. --, 115 S.Ct. 2199, 2204 (1995) (and cases cited therein); *Ex parte Lange*, *supra*. The latter protection, which by the language of the Fifth Amendment is the core concern of the Clause,[3] is the aspect of double jeopardy Mr. Baird invoked here.

I

The Administrative Sanctions Imposed by the Government and Directed at an Individual Can Constitute Punishment of that Individual Under The Double Jeopardy Clause of the Fifth Amendment.

The panel majority erred in holding that the Double Jeopardy Clause of the Fifth Amendment does not protect Frank Baird from criminal prosecution after his property was subjected to administrative forfeiture on account of the same offense. Under the panel majority's first holding, Mr. Baird would qualify as "punished" if he had submitted a claim and cost bond to the agency, thus forcing the government to file an *in rem* forfeiture

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[2]See *Witte, infra,* 115 S.Ct. at 2309-10 (Scalia, J., dissenting); *Kurth Ranch, supra* (Scalia, J., dissenting).

[3]In *Ex parte Lange, supra,* this Court showed that the protection against successive punishment is not only at the core of Double Jeopardy protection but also has deep due process and common law foundations.

complaint in the district court (where ultimately, on these facts, he presumably would have eventually stipulated to the entry of a judgment of forfeiture of most or all of the money). According to the panel majority, Mr. Baird thus was not punished by standing by and allowing the government to take his money: nor would he have been "punished" by that same administrative forfeiture-by-default if he had frivolously sought remission or mitigation from the agency, 21 C.F.R. §1316.79, thereby inducing a (pointless) determination that the property was his. Contrary to this holding, however, threshold constitutional questions of real substance cannot properly be made to turn on procedural maneuvering of this kind.

A forfeiture occurring after the initiation of judicial process, characterized by the panel majority as "civil", results only when a claim is made not only of ownership of the property (which in itself is *never* ground for its recovery), but "innocent" ownership as defined by §881(a)(6) and the corresponding regulations. Mere ownership of seized property is never a basis for shielding from forfeiture. A claim for return of property based on nothing but "ownership" would be frivolous and unavailing. The seizure is not, as the panel majority states, a "non-proceeding", App., *infra* at 109, possible only because no one steps forth to claim the property: it is a very real sanction imposed because the government asserts that the money it seized was involved in the drug trade with its owners' knowledge. Contrary to the panel majority's first holding, no decision maker needed to "determine" that the property was Mr. Baird's, because the government averred this to be so and he did not chose to contest that averment. As Judge Sarokin's dissent properly noted, "ownership of the [seized] funds in the instant case is not honestly contested." App., *infra* at 28a. When the time elapsed during which he could have opposed the government's contention, the point was decided by default.

This Court has recognized that civil forfeiture imposed on account of a federal drug offense may be a form of punishment. All of the characteristics of the real estate and vehicle forfeitures at issue in *Austin* which led this Court to label them punitive are present in the seizure of Mr. Baird's money. This seizure, like the *Austin* seizures under 21 U.S.C. §§ 881(a)(4) and (7), was tied directly to the commission of drug offenses. Money can be seized under §881 (a)(6) only if it was used in an exchange involving illegal drugs or to facilitate a violation of the drug laws. *Austin,* 113 U.S. at 2811, 21 U.S.C. §881(a)(6). The legislative history of §881, detailed in Austin, demonstrates that Congress, viewing the traditional sanctions of fine and imprisonment . . . inadequate to deter or punish the enormously profitable trade in dangerous drugs . . ." saw forfeiture as "a powerful deterrent". *Austin,* 113 U.S. at 2811, *quoting* S. Rep. No. 98-225 pp. 191, 195. Seizure of property ordinarily not illegal, such as a vehicle, or in this case, money, is punitive because doing so does not remove the dangerous substance, i.e., drugs, from society, nor does it have to bear any relationship to the government's costs of squelching illegal activity. *Austin,* 113 U.S. at 2811-12. The seizure of Mr. Baird's property was also subject to an "innocent owner" defense, a departure from traditional remedial forfeiture laws. The forfeiture statute's focus on the culpability of the owner flavored these forfeitures with punishment. *Austin,* 113 U.S. at 2810-11. Every element of the seizure in *Austin* cited by this Court as indicia of punishment was present in Mr. Baird's case. The panel majority's threshold requirement that a formal adjudication determining ownership precede or accompany a forfeiture before it can constitute "punishment" for double jeopardy does not withstand scrutiny.

Criminal defendants who choose advisedly to accept the penalty of forfeiture without requiring that the matter be brought to court are penalized by the panel majority's decision. The panel

majority's opinion sets forth a new threshold for the effective defense of drug cases: from now on, criminal defendants and their lawyers will have to start a scrap over a 21 U.S.C. §881 administrative forfeiture, even when they know they have no hope of successfully proving anything to support a right to recovery other than their ownership of the property in question. Criminal defendants who wish to accept the consequences of their actions may now be punished twice in separate proceedings. Only those prepared to clog federal district courts at all levels with *pro forma* and frivolous claims for return of their property will be able to avoid a second punishment. A criminal defense attorney who knows that he cannot successfully challenge a seizure of his client's money pursuant to 21 U.S.C. §881(a)(6) will now nevertheless be forced to do so only to preserve his client's right against successive punishment. This decision and similar decisions in the Ninth and Seventh Circuits will create a new threshold for the defense of drug charges and other federal crimes wherein the same forfeiture rules used against Mr. Baird apply. "[A] rule which would require property owners to file a claim and go through the motions of contesting a civil forfeiture merely to preserve a double jeopardy issue has little to recommend it. Tens of thousands of uncontested forfeitures would find their way into court." D. SMITH PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶12.10 n.33.1. A ruling by the Court in this case will provide the clarification the Third Circuit and other courts require to give the ruling in *Kurth Ranch* its due.

Mr. Baird's resignation in and submission to the forfeiture did not in any way diminish its real or constitutional impact. In seizing his property the government utilized a legislative scheme meant to punish those who tolerate the use of their money in the drug trade. The administrative forfeiture of Mr. Baird's money was identical in purpose, form and function to a judicial forfeiture wherein a property owner suffered a summary judgment. *Kurth*

Ranch ruled that a ministerial decree - a tax assessment - was punishment. The panel majority though, disdaining mention of the facts underlying *Kurth Ranch*, disregarded one of its most important holdings: Such a penalty is a "civil penalty", even though it was imposed without a defendant's passage through some sort of trial or other ordeal, where guilt was formally adjudicated and sentence imposed. "The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offense.'" *Kurth Ranch*, 114 S.Ct. at 1948. The seizing of Mr. Baird's money, the notice to him that it would be forfeited unless he not only claimed ownership, but defended his possession of it, and his acquiescence in it similarly functioned as a criminal prosection, albeit one in which Mr. Baird, by not contesting the forfeiture, entered the "functional equivalent" of a plea of guilty or nolo contendere. Mr. Baird subsequently bore, and carried his burden at the hearing on his double jeopardy motion in the district court of proving that it was his money the government seized, and it was he the government sought to punish by its forfeiture.

The panel majority below eschewed this analysis by calling forfeiture a "non-proceeding," App., *infra* at 10a, 15a, implying that administrative forfeitures were unworthy of any consideration under the Double Jeopardy Clause. This focus on whether the punishment results from a "proceeding" is unique to the Third Circuit, and runs afoul of both the spirit and letter of *Kurth Ranch*. The proper focus is on the sanction, and the reasons and methods therefore. Judge Sarokin's dissent properly omitted any mention of the administrative origins of the forfeiture, choosing instead to dwell on §881(a)(6), which authorized both the administrative forfeiture which befell Mr. Baird and any judicial proceedings which would have occurred to forfeit the funds had he chosen to contest the forfeiture.

II

The Protection Against Successive Punishments Provided by the Double Jeopardy Clause of the Fifth Amendment is not Limited to Successive Punishments Only Imposed in "Judicial" Proceedings.

The panel majority affirmed the lower court's ruling "that jeopardy has not attached pursuant to the administrative forfeiture proceeding". App., *infra*. at 23a-24a. That ruling is unsupported and erroneous. In *Halper*, this Court recognized that the Double Jeopardy Clause bars any punishment imposed by the same sovereign for the "same offense" in a separate, successive proceeding, regardless of whether it is labeled civil or criminal by the legislature. 490 U.S. at 450 Generalities about double jeopardy doctrine quoted from cases which predate *Halper* such as *Serfass* are of little assistance in deciding cases where the punishment or threatened punishment does not arise out of the criminal prosecution. Contrary to the panel majority's holding, since Mr. Baird was actually punished by the forfeiture, it is not necessary or appropriate separately to analyze whether "jeopardy attached" in the forfeiture proceedings. Moreover, his failure to respond to the administrative forfeiture notice was an appropriate, inexpensive method of conceding -- without making a judicial admission -- the government's allegations that the property was his and had been used or acquired in such a manner as to subject it to forfeiture.

The panel majority adopted the rationale set forth by the Seventh Circuit in *United States v. Torres*, 28 F.3d 1463 (7th Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 669 (1994) when it held that Mr. Baird's refraining from contesting the administrative forfeiture caused jeopardy not to attach. App., *infra* at 11a. (One week before the Third Circuit's decision in this case, the

United States Court of Appeals for the Ninth Circuit also held that a defendant who does not challenge an administrative forfeiture may not later claim that the forfeiture so punished him that he may not be tried for the offenses underlying the forfeiture. *United States v. Cretacci*, 62 F.3d 307, 310 (9th Cir. 1995). That court though held that under such circumstances, the property was deemed abandoned, and as such, a defendant could not claim the government punished him by seizing it. The Third Circuit properly ignored that disingenuous analysis.) The panel majority's analysis mistakenly rejected a sound successive punishment claim because, in effect, the first punishment did not involve a prior prosecution. This ruling destroys the distinct protection against successive punishment in just the way that Justices Scalia and Thomas have urged, but which the other seven Justices have refused. The concept of "attachment" of jeopardy has no bearing on a claim of prohibited double punishment. In *Kurth Ranch*, for example, this Court did not even allude to the "attachment" concept, and it is not clear how or when jeopardy would be said to "attach" in the administrative assessment of a tax such as the one held in that case to constitute a second punishment for the drug offenses involved there.

The panel majority's attempt to explain why its ruling is consistent with *Kurth Ranch*, App., *infra* at 14a, is unavailing. As it happened, in that case, the criminal punishment was imposed first, which necessarily followed an "attachment" of jeopardy. But the literal language of the Double Jeopardy Clause refers to being placed "*twice* ... in jeopardy." If, as this Court held, the imposition of the drug tax was a prohibited second punishment, then by definition the Court was holding that imposition -- which did not result from any fact-finding proceeding, judicial or otherwise -- did satisfy the requirement of a second "jeopardy." In other words, under the Supreme Court's interpretation in *Kurth Ranch* of the post-*Halper* double jeopardy

regime, where punishment has actually been imposed, there has necessarily been jeopardy of punishment.

The question whether jeopardy has "attached" only arises as a separate issue where punishment was *not* actually imposed in the first proceeding. The most common example is presented in cases where a criminal trial has terminated without reaching either a conviction or an acquittal. See, *e.g.*, *Crist v. Bretz*, 437 U.S. 28, 32-36 (1978) (dismissal after jury sworn). The question whether further proceedings will be permitted in such cases thus depends upon whether the defendant has yet been "in jeopardy" of punishment, and if so, whether that jeopardy has terminated or is simply continuing (as where the defendant himself files the appeal, or where there was "manifest necessity" for a mistrial). In a case claiming successive punishment, on the other hand, the only necessary inquiry is whether the defendant previously has been punished for the same offense.

The panel majority's reliance on language from *Serfass* ("the constitutional [double jeopardy] prohibition can have no application, until a defendant is 'put to trial before the trier of facts .... '"420 U.S. at 388), App. *infra* at 12a was misplaced. This Court used that language in a very different context. *Serfass* involved a claim that the trial court's ruling on a pretrial motion to dismiss, because it implicated the merits of the charges was tantamount to an acquittal which barred further proceedings. Double jeopardy claims of prior acquittal obviously have little in common with claims of protection against successive punishment. This Court has previously acknowledged that valid double jeopardy claims can and do exist in circumstances that do not come within the quoted language from *Serfass*. For example, jeopardy attaches in a criminal case upon acceptance of a guilty plea, even though the defendant in such a case has not been "put to trial before [any] trier of facts." *See United States v. Hecht,*

638 F.2d 651, 656 (3rd Cir. 1981); *United States v. Bullock,* 579 F.2d 1116, 1118 (8th Cir.) *cert denied* 439 U.S. 967 (1978).

Under the reasoning of the panel majority, Congress could defeat the protections of the Double Jeopardy Clause by authorizing an Executive department or agency, such as the EPA, the State Department,[4] or the Coast Guard,[5] to impose a punitive (although nominally civil) fine or other sanction, based on a finding of criminal conduct, and then allowing a criminal prosecution for the same offense. The protections of the Bill of Rights are not so easily evaded. As the panel majority notes, "Federal civil forfeiture statues allow certain statutorily defined categories of property to be forfeited administratively . . ." without requiring judicial process. App. *infra,* at 9a, (citing D. SMITH, ¶6.01 at 6-2). Quoting *United States v. United States Currency, Etc.*, 754 F.2d 208, 211 (7th Cir. 1985), the panel majority further expounds that administrative forfeitures save the government the time and expense of a judicial forfeiture proceeding. App. *infra*, at 9a. Administrative forfeitures under §881(a)(6) are expeditious substitutes for judicial forfeitures, to which all of the requisites of due process precede the exacting of

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[4]*Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (loss of citizenship is "punishment under Fifth and Sixth Amendments).

[5]*Cf. United States v. Ward*, 448 U.S. 242 (1980) (particular penalty for violating Clean Water Act held, after analysis, not to constitute "punishment").

a penalty as great as that as could a court.[6] The panel majority's

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[6]The similarity, in form and effect, between judicial and administrative forfeitures, did not escape a federal circuit court more than one hundred years ago. That court declaimed upon a statute which like §881(a)(6), allowed forfeiture of property after notice of the intent to seize the property to interested parties and publication of the notice in a legal newspaper for three weeks, in the absence of a claim, the property could be forfeited. Speaking to a grievance that a forfeiture of illegally imported property was illegal because it was accomplished with then recently enacted administrative forfeiture proceedings, that court said:

> The manifest purpose of that act [allowing administrative forfeitures by the Department of the Treasury] was to save the government the expense of proceedings for a judicial condemnation of property forfeited, in cases where the property was of inconsiderable value . . . . *These provisions of law were originally adopted as a substitute for the ordinary judicial proceeding in a specified class of seizures. They contemplate a form and mode of proceeding having the ordinary characteristics of a judicial proceeding in rem,* which is ordinarily initiated by a seizure of the res, and in which personal notice to persons interested in the property is commonly dispensed with. They afford a reasonable notice by publication of the commencement of the proceeding, and of the cause of seizure, and preserve to the persons interested in the property a reasonable opportunity to assert their claim, and have their rights judicially determined.

refusal to accord an unchallenged administrative forfeiture the same effect as a summary judgment in favor of the government in a judicial forfeiture is therefore wrong. Because the indictment in this case places Mr. Baird in jeopardy of successive punishment, it should have been dismissed.

III

A Determination that Administrative Forfeitures Constitute Punishment Under the Double Jeopardy Clause Will Prevent Appeals of Administrative Sanctions Solely to Create a Judicial Sanction and Allow Prosecutors More Certainty in Their Use of Administrative Sanctions.

The Third Circuit's decision in this case will have a substantial and adverse impact on the administration of justice in the Third Circuit and if followed in other courts, the entire nation. So long as this Court does not rule on this issue, persons facing administrative forfeitures and other administrative sanctions, who might otherwise accede to the loss of their property, will instead contest them in order to avoid the loss of their right to be punished once under the Double Jeopardy Clause in the event they are indicted in the future. The government, in petitions for writs of certiorari in this Court in *$405,089.23* and *Ursery*, cites the flood of hundreds of motions from defendants either awaiting trial or already convicted in the Ninth Circuit as proof of the need for further definition of this Court's rulings in *Halper*, *Austin* and *Kurth Ranch* that sanctions such as forfeitures and taxes may be punishments. One commentator has noted that

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McGuire v. Winslow, 26 F. 304, 307 (C.C.N.D.N.Y. 1886) (emphasis added). What was obvious in 1886 is obvious today: administrative forfeitures have the same effect as judicial forfeitures.

this trend in pre- and post-conviction challenges is nationwide. D. SMITH, *supra, ¶12.10 n.38.* The imposition of pre-trial sanctions like forfeitures and license suspensions, *see generally* 95 Lawyers Weekly USA 909, 922, *Drunk Driving Defense Okayed by U.S. Court* (September 25, 1995) and D. SMITH, *supra, ¶12.10* n.38 will continue to provide the basis for continued attempts to litigate this issue until it is resolved by this Court. Nationwide, prosecutors have taken note. A brief amicus curiae filed by forty-one states in support of the government's petition for a writ of certiorari in *$409,089.23*, states that state prosecutors are reluctant to proceed with parallel civil forfeiture and criminal proceedings, or driver's license suspensions and driving under the influence convictions, for fear of risking invalidations of criminal convictions. *Brief Amicus Curiae of the Commonwealth of Massachusetts, Forty-one States, and The Commonwealth of Puerto Rico in Support of Petitioner,* filed in *$409,089.23* at p. 8.

The pendency of the government's certiorari petitions in *$405,089.23* and *Ursery* at the same time as this case afford this Court an opportunity to review not only the issue of whether pre-trial forfeitures are punishment which bar trial on underlying criminal offenses but the type of forfeitures which will be recognized as punishment, and the allocation of the burden of proving that punishment has occurred. Judge Sarokin touched on this question in his dissent below, correctly observing that not every forfeiture under §881(a) is punishment and predicting that courts will have to devise procedures for hearing such claims, deciding if punishment was inflicted and who received it. App., *infra* at 31a-32a. If this Court grants certiorari in *$405,089.23* and *Ursery*, it should also do so in this case and consolidate all of the cases for oral argument.

CONCLUSION

The petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to the Supreme Court of the United States Court of Appeals for the Third Circuit to review the question presented herein, based upon the Court of Appeals' decision on an important issue of federal constitutional law which has not been, but should be settled by this Court.

Respectfully submitted,

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APPENDIX

Filed August 11, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1202

UNITED STATES OF AMERICA

v.

FRANK L. BAIRD,

Apellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 94-cr-00215)

BEFORE: COWEN, LEWIS and SAROKIN
Circuit Judges.

(Filed August 11, 1995)

OPINION OF THE COURT

LEWIS, Circuit Judge.

In this appeal, the appellant, Frank L. Baird ("Baird"), seeks dismissal on double jeopardy grounds of a superseding indictment charging him with violations of federal criminal law. He argues that as a result of a prior administrative forfeiture of monies seized from his residence, he has already been once "punished" for the offenses alleged in the indictment. A subsequent criminal prosecution would, he argues, run afoul of the Double Jeopardy Clause.

To assess the merits of Baird's unusual double jeopardy argument, we must determine whether Baird was "punished" as a result of the administrative forfeiture of money seized from his residence. We conclude that Baird was not "punished" by the administrative forfeiture of seized money never determined to be his. Moreover, assuming, *arguendo*, that the forfeited money belonged to Baird, we further conclude that the administrative forfeiture did not place Baird in a former jeopardy. Therefore, the pending prosecution of Baird for the offenses alleged in the superseding indictment will not subject Baird to double jeopardy. For these reasons, we will affirm the district court's denial of Baird's motion to dismiss.

I. *Facts and Procedural History*

In April of 1994, law enforcement officials conducted a search of Frank Baird's residence on the suspicion that he was manufacturing and selling 3,4 methylenedioxy-methamphetamine ("Ecstacy"). The search of Baird's residence turned up an elaborate clandestine Ecstacy-manufacturing operation, complete with precursor chemicals, extensive laboratory apparatus, coded formulas for the manufacture of the drug, and stock piles of already manufactured Ecstacy. In addition, $2,582 in United States currency was found in the bedroom area of Baird's residence. This money was seized by law enforcement officials.

In a superseding indictment returned in August of 1994, Baird was charged with various drug and drug-related violations of federal criminal law.[1] Prior to the returning of this indictment against him, however, the Drug Enforcement Administration ("DEA") carried out the administrative forfeiture of the $2,582 seized from Baird's residence.

In February of 1995, Baird filed a pre-trial motion to dismiss the superseding indictment on double jeopardy grounds. The district court denied Baird's motion, finding under *United States v. Torres,* 28 F.3d 1463 (7th Cir. 1994), and *United States v. Tilley,* 18 F.3d 295 (5th Cir. 1994), that initial jeopardy did not attach as a result of the administrative forfeiture of the seized money. This interlocutory appeal followed. We have stayed Baird's trial pending resolution of his appeal.

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[1]Baird was charged in Count 1 with conspiracy to manufacture and distribute Ecstacy; in Count 2, with the manufacture of approximately 20 kilograms of Ecstacy; in Count 3, with possessing approximately 32 kilograms of Ecstacy with the intent to distribute it within 1000 feet of the Baldwin School located in Bryn Mawr, Pennsylvania; in Count 4, with possessing approximately 32 kilograms of Ecstacy with the intent to distribute it; in Count 5, with attempt to manufacture Ecstacy; in Count 6, with attempt to manufacture amphetamine; in Count 7, with creating a substantial risk of harm to human life while manufacturing and attempting to manufacture Ecstacy; in Count 8, with maintaining a place for the purpose of manufacturing Ecstacy; and in Count 9, with carrying a firearm during and in relation to a drug trafficking crime for which Baird could be prosecuted in a Court of the United States, that is, possession of Ecstacy with the intent to distribute it, as charged in Count 4.

II. *Jurisdiction and Standard of Review*

Subject matter jurisdiction of the district court is based upon 18 U.S.C. §3231.[2] We have jurisdiction over Baird's appeal under 28 U.S.C. §1291[3] and the collateral order doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Witte v. United States,* ___U.S.___, 115 S.Ct. 2199 (1995) (Holding that a multiple punishments double jeopardy claim is ripe for appellate review even where the claimant has yet to have been a second time convicted).[4] Our

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[2]18 U.S.C. §3231 provides:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

[3] 28 U.S.C. §1291 provides:

> The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... except where a direct review may be had in the Supreme Court.

[4] The government has filed a motion to dismiss Baird's appeal in which it argues that the right Baird asserts - the right not to be punished twice for the same offense - can be fully vindicated on appeal at the conclusion of Baird's trial, and that we therefore lack jurisdiction under the collateral order doctrine to hear Baird's appeal. In light of the recently decided *Witte v. United States*, this argument is clearly untenable. We will, therefore, deny the government's motion to dismiss.

review of the double jeopardy issue in this case is plenary. *See Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (legal questions are subject to plenary appellate review).

III. *Double Jeopardy Analysis*

The Double Jeopardy Clause of the Fifth Amendment[5] has been said to protect against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *See, e.g., North Carolina v. Pearce,* 395 U.S. 711, 717 (1969); *Schiro v. Farley,* 114 S.Ct. 783, 789 (1994). "These protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." *Schiro,* 114 S.Ct. at 789. According to the parties, it is the third of these abuses--multiple punishments for the same offense--which is of concern in this appeal.

The Supreme Court has stated that "the primary evil to be guarded against [by the Double Jeopardy Clause] is successive prosecutions: '[T]he prohibition against multiple trials is the controlling constitutional principle.'" *Id.* (citations omitted). Nevertheless, the prohibition against multiple *punishments* for the same offense has "deep roots in our history and our jurisprudence." *United States v. Halper*, 490 U.S. 435, 440 (1989).

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[5]The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. Amdt. 5.

> As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." In drafting his initial version of what came to be our Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." In our case law too, this Court, over a century ago, observed; "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall 163, 168, 21 L.Ed.872 (1874).

Id. (some citations omitted).

In two recent unanimous decisions, the Supreme Court gave the "no multiple punishments" rule a "breadth of effect it had never before enjoyed." *See Montana Dept. of Rev. v. Kurth Ranch*, 114 S.Ct. 1937, 1957 (1994) (Scalia, J., dissenting). In the first of these, *United States v. Halper*, 490 U.S. 435 (1989), the Court for the first time announced that *civil* penalties may, in certain instances, constitute "punishment" for double jeopardy purposes. *Halper*, 490 U.S. at 448. In the second, *Austin v. United States*, 113 S.Ct. 2801 (1993), the Court relied upon *Halper* to conclude that civil forfeitures undertaken pursuant to 21 U.S.C. §§881(a)(4) and (a)(7)[6] constitute "punishment" for

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[6]These statutes provide for the forfeiture of:

> (4) All conveyances including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt,

purposes of Eighth Amendment Excessive Fines Clause[7] analysis. *Austin*, 113 S.Ct. at 2812. While *Austin* addressed the meaning of "punishment" in a different context, we agree with the Court of Appeals for the Ninth Circuit: the "only fair reading of the Court's decision in *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause." *United States v. $405,089.23 United States Currency*, 33 F.3d 1210, 1219 (9th Cir. 1994), *opinion amended on denial of rehearing*, ___F.3d ___, 1995 WL 321826 (9th Cir. 1995); *see also* David Smith *Prosecution and Defense of Forfeiture Cases* ¶ 12.10[2].

> possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution]
>
> . . . .
>
> (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

21 U.S.C. §§881(a)(4), (7).

[7]The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amdt. 8.

at 12-131 ("The Supreme Court's decision in *Austin v. United States*, makes it clear that *Halper's* double jeopardy protections do apply to the vast majority of civil forfeiture cases.").

According to Baird, together, *Halper* and *Austin* establish that the administrative forfeiture of money under 21 U.S.C. §881(a)(6)[8] constitutes "punishment" for purposes of double jeopardy analysis. We do not think *Halper* and *Austin* go so far. While these precedents do suggest that the *civil* forfeiture of money under 21 U.S.C. §881(a)(6) is "punishment" precluding the meting out of additional punishment for the "same offence" by the "same sovereign" in a subsequent proceeding, *see $405,089.23 United States Currency*, 33 F.3d at 1222 (holding that civil forfeitures of drug proceeds under 21 U.S.C. §881(a)(6) constitute "punishment" under *Halper* and *Austin*); *but see Tilley*, 18 F.3d at 300 (holding that civil forfeitures of drug proceeds do *not* constitute "punishment" for double jeopardy purposes), *Halper* and *Austin* do not suggest, let alone establish, that *administrative* forfeiture under §881(a)(6) amounts to "punishment" relevant to the double jeopardy inquiry. To

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[8]21 U.S.C. §881(a)(6) provides for the forfeiture of:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .

understand the critical distinction we are drawing between civil and administrative forfeiture, a brief discussion of the nature and process of administrative forfeiture is in order.

The purpose of administrative forfeiture is "to save the government the time and expense of [a] judicial [forfeiture] proceeding in cases where the value of the seized property [is] small." *United States v. United States Currency Etc.*, 754 F.2d 208, 211 (7th Cir. 1985).[9] In keeping with this purpose, Federal civil forfeiture statutes allow certain statutorily defined categories of property to be forfeited administratively, i.e., without the filing of a civil forfeiture action in federal district court. *See* David Smith *Prosecution and Defense of Forfeiture Cases* ¶6.01, at 6-1.

The administrative forfeiture procedure begins with the seizing agency, in this case the DEA, publishing a notice of seizure and intent to forfeit once a week for at least three successive weeks in a newspaper of general circulation in the judicial district in which the seizure occurred. 19 U.S.C. §1607(a); 21 C.F.R. §1316.75. The agency is also statutorily required to give personal written notice of the seizure and information on the applicable procedure to any party who appears to have an interest in the seized property. 19 U.S.C. §1607(a). A person may contest an administrative forfeiture, at any time within twenty days of the first publication of the notice of seizure, by filing a claim "stating his [or her] interest therein," and posting a cost bond of $5,000 or ten percent of the value of the property, whichever is less, but not less than $250.

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[9]Under 19 U.S.C. §1607(a), administrative forfeiture may be undertaken to effect the forfeiture of as much as $500,000 in United States currency.

19 U.S.C. §1608. The proper and timely filing of a claim and cost bond has the effect of stopping the administrative forfeiture process, and forcing the seizing agency to refer the matter to the United States Attorney for the district where the property was seized for the institution of judicial forfeiture proceedings in the ordinary mode prescribed by law. 19 U.S.C. §§1603(b) and 1608; 21 C.F.R. §1316.76(b). Where no person files a claim to the seized property within the statutory period, the agency is authorized to declare the property forfeited. 19 U.S.C. §1609(b); 21 C.F.R. §1316.77.

In sum, administrative forfeiture is a procedure available to the government "*only* if the value of the property seized is less than the jurisdictional amount *and* if no claim to the property is filed within the twenty days after the date of first publication of the notice of seizure." *United States Currency Etc.*, 754 F.2d at 212 (emphasis in the original). Significantly for our purposes, administrative forfeiture is only appropriate in cases where the seized property in question goes unclaimed. Without overstating it, administrative forfeiture is, in reality, a *non-proceeding*--it is merely the consequence of no one having come forward to claim the property seized or contest its forfeitability. With this introduction to administrative forfeiture in mind, we turn now to determine the merits of Baird's double jeopardy claim.

Without adopting a position on the matter, we can certainly understand how a court might conclude that *civil* forfeiture under 21 U.S.C. §881(a)(6) of drug proceeds constitutes "punishment" for double jeopardy purposes. *See $405,089.23 United States Currency*, 33 F.3d at 1218-22. However, we cannot fathom how an *administrative* forfeiture, under section 881(a)(6), of *unclaimed* alleged drug proceeds could possibly be held to constitute "punishment" in relation to an individual's double jeopardy claim. Any 'punishment"

resulting from the administrative forfeiture of suspected drug proceeds is punishment only in the abstract, wholly unattached to any specific person, and thus cannot serve as the basis for a double jeopardy claim. This is because administrative forfeiture does not, and, by its very definition, cannot, entail a determination of ownership of the property to be forfeited. All property administratively forfeited is, as a matter of law, "ownerless" property, and the taking of ownerless property "punishes" no one. Because Baird never asserted an interest in the money that was seized from his residence, he cannot now claim to have been punished by its forfeiture.

Even were we to assume, *arguendo*, that Baird was the owner of the seized and forfeited money, we would nonetheless affirm the district court's denial of Baird's motion to dismiss because we do not agree that administrative forfeitures place in jeopardy the person whose property is so forfeited.

Succinctly stated, "[y]ou can't have double jeopardy without a former jeopardy[;]" that is, to prevail on a double jeopardy claim, former jeopardy must be shown to have attached. *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994) (*citing Serfass v. United States*, 420 U.S. 377, 389 (1975)). In essence, Baird asks us to find that he was placed in jeopardy by the non-judicial administrative forfeiture process undertaken in this case. In rejecting this argument, we are compelled to explain what it means to be placed "in jeopardy."

The Double Jeopardy Clause was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him [or her] to embarrassment, expense and ordeal and compelling him [or her] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he [or she] may be found guilty.

Id. at 187-88. As an aid to the resolution of double jeopardy claims, "courts have found it useful to define a point in criminal [and, post-*Halper*], civil proceedings at which the constitutional purposes and policies [behind the Double Jeopardy Clause] are implicated by resort to the concept of 'attachment of jeopardy.'" *Serfass*, 420 U.S. at 388. In the case of a jury trial, for example, jeopardy is understood as attaching when the jury is empaneled and sworn. *Id.* In the case of a non-jury trial, jeopardy has been said to attach when the court begins to hear evidence. *Id.* In any event, the Court has "consistently adhered to the view that jeopardy does not attach, *and the constitutional [double jeopardy] prohibition can have no application*, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge.'" *Serfass*, 420 U.S. at 388 (emphasis supplied).

> Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy.

Id. (citations omitted). It should be clear from this description of the "attachment" concept that jeopardy does not, and cannot, attach until one is made a *party* to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence, and that, until such time, the constitutional double jeopardy prohibition can have no application.[10]

Because Baird failed to contest the forfeiture, he never became a party to any judicial proceeding, criminal or civil. In fact, no judicial proceeding occurred prior to the forfeiture of the money - such being the very nature of administrative forfeiture. Baird has therefore yet to have been placed in jeopardy, or at risk, of a determination of "guilt" and the concomitant imposition of "punishment." Like the double jeopardy claimant in *Torres*, as a non-party to the administrative forfeiture process, Baird was not, and could not have been, placed at risk by that process. And without having been placed at risk of a determination of guilt, jeopardy did not attach as a consequence of the administrative forfeiture. Thus, "neither an appeal nor further

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[10]In *Halper* and *Austin*, and, for that matter, in *Montana Dept. of Rev. v. Kurth Ranch*, 114 S.Ct. 1937 (1994), the Court did not discuss the attachment threshold issue. We do not take the Court's failure to discuss "attachment" in these cases to signify that it has intended, by implication, to do away with the venerable "attachment" threshold requirement. In each of these three cases, it was clear that the double jeopardy claimant or claimants suffered "punishment" only after having first been made a party to a proceeding before a trier of fact with jurisdiction to decide "innocence" or "guilt." Thus, the "attachment" threshold was, in each of these cases, clearly enough satisfied that no discussion of it was required.

prosecution [of Baird would] constitute[] double jeopardy." *Torres*, 28 F.3d at 1465 (*quoting Serfass*, 420 U.S. at 389).

By asking us to find a double jeopardy violation in his case, Baird is asking, essentially, that we give to the "no multiple punishments" rule a breadth of effect greater even than that given to it by *Halper, Austin* and *Kurth Ranch*. Baird would have us conclude that multiple punishments, *per se*, violate the Double Jeopardy Clause. Even under the above precedents, this just isn't so. Prior to *Halper*, the "no multiple punishments" rule was of rather limited effect - merely proscribing the imposition of those cumulative punishments, for example, fine and incarceration, not authorized by the legislature. *See Halper*, 490 U.S. at 451 n.10. As noted above, *Halper* extended the no-double-punishments rule to civil penalties. *Halper* also "affirm[ed] that [the no multiple punishments rule] demand[s] more than mere fidelity to legislative intent . . . ." *Kurth Ranch*, 114 S.Ct. at 1957 (Scalia, J., dissenting). Significantly, however, *Halper* did not remove from the double jeopardy claimant's shoulders the burden of establishing a *former jeopardy*. A post-*Halper* double jeopardy claimant in the position of Baird, therefore, cannot prevail *merely* upon a showing that he or she has been once punished for the same offense by the same sovereign. Rather, the post-*Halper* double jeopardy claimant must also show that the initial punishment was meted out during the course of a prior proceeding having the "functional equivalen[ce] of a [prior] criminal prosecution that placed the [claimant] in jeopardy . . . 'for the same offence.'" *Kurth Ranch*, 114 S.Ct. at 1948. In other words, to prevail on his post-*Halper* double jeopardy claim, Baird would have to

establish a former jeopardy.[11] Because of the very manner in which the seized property was forfeited, this he was unable to do.

IV. *Conclusion*

Having concluded that we have jurisdiction to hear this appeal, and having further concluded that Frank Baird was not punished as a result of the administrative forfeiture of the money seized from his residence, and that a former jeopardy did not attach as a result of the administrative forfeiture of money assumed for the sake of argument to have been Baird's property, we will deny the government's motion to dismiss this appeal, and affirm the district court's denial of Baird's motion to dismiss the superseding indictment on double jeopardy grounds.

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[11]The dissent argues that participation in a forfeiture proceeding should not be a precondition to a double jeopardy claim. This argument does away with the multiple jeopardy requirement and is, therefore, contrary to Supreme Court precedent, *see Serfass*, 420 U.S. 377 (1975), not to mention the language of the Double Jeopardy Clause itself. We are also troubled by the suggestion, implicit in the dissent, that one can be "punished" in a manner relevant to the Double Jeopardy Clause without having been subjected to any judicial process whatsoever. "Unless the whole doctrine of our system of jurisprudence, both the Constitution and the common law, for the protection of personal rights . . . [is] a nullity," *Ex parte Lange*, 85 U.S. 163, 176 (1874), no one may be "punished" in a manner relevant to the Double Jeopardy Clause without first having been subjected to some form of *judicial* procedure, either in the form of a criminal prosecution or the "functional equivalent" thereof.

SAROKIN, Circuit Judge, dissenting.

I agree with the majority that this court has jurisdiction over defendant's appeal. Maj. op. at 4. Accordingly, I too would deny the United State's motion to dismiss the appeal for lack of jurisdiction. On the merits, I conclude that forfeiture pursuant to 21 U.S.C.A. §881(a)(6) may constitute punishment for purposes of the Double Jeopardy Clause. I respectfully dissent because I believe that double jeopardy can arise following a forfeiture, even where defendant has not participated in the forfeiture proceeding, if the defendant can establish that he was the owner of the forfeited property and that such forfeiture constituted punishment.

I.

The Fifth Amendment's Double Jeopardy Clause reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. The Supreme Court has explained that "the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). The instant case involves the third of these protections, a protection which "has deep roots in our history and jurisprudence." *Id.*

In *Witte v. United States*, ___U.S.___, 115 S.Ct. 2199 (1995), the Supreme Court recently held that although a petitioner had not yet been twice convicted, his "multiple punishment" claim was ripe for appellate review before trial because "the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense;

by its terms, it protects a criminal defendant from being twice put in jeopardy for such punishment." *Id.* at 2204-2205. In the instant case, if defendant was punished by the forfeiture, the prospect of a criminal trial and further punishment places him in jeopardy of prohibited multiple punishments. Thus, it is appropriate and required to adjudicate his claim prior to trial and on appeal, before he is subjected to the *risk* of a second punishment for the same offense.

II.

I turn to the merits of defendant's double jeopardy claim. The question presented is whether forfeiture pursuant to 21 U.S.C.A §881(a)(6) (West 1981) constitutes punishment for purposes of the Double Jeopardy Clause. Three recent Supreme Court decisions guide our analysis. *See Department of Revenue v. Kurth Ranch,* ___U.S.___, 114 S.Ct. 1937 (1994); *Austin v. United States,* ___U.S.___, 113 S.Ct. 2801 (1993); *United States v. Halper,* 490 U.S. 435 (1989).

In *United States v. Halper,* the Supreme Court considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U.S. at 436. The Court fashioned the following test: "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* at 448. Specifically, the Court held that the Double Jeopardy Clause's prohibition against multiple punishments for the same offense was violated where a defendant who already had been punished in a criminal prosecution was subjected to an additional civil sanction to the extent that the second sanction served the traditional goals of punishment-deterrence and retribution. *Id.* at 449.

The Supreme Court recently applied the *Halper* test in *Department of Revenue v. Kurth Ranch,* supra. There, the Supreme Court considered whether a state tax imposed on the possession and storage of dangerous drugs constituted a second punishment for purposes of the Double Jeopardy Clause. The Court began its discussion by noting that although the Amendment's text only mentions harms to "life or limb," it is well settled that the Amendment covers monetary penalties. 114 S.Ct. at 1941 n.1. Recognizing that *Halper* decided that the legislature's description of a statute as civil is not determinative of the Double Jeopardy issue, the Court focused instead on whether the tax had punitive characteristics that subjected it to the constraints of the Double Jeopardy Clause. *Kurth Ranch*, 114 S.Ct. at 1945. The Court found it indicative of penal intent that the tax was conditioned on the commission of a crime and was exacted only after the taxpayer had been arrested for the precise conduct that gave rise to the tax obligation. *Id.* at 1947. The Court held that the drug tax was punitive in nature and therefore must be imposed in the first proceeding or not at all. *Id.* at 1948.

In *Austin v. United States, supra,* the Supreme Court relied heavily on the rationale of *Halper* to determine whether civil forfeiture pursuant to 21 U.S.C.A §§881(a)(4) and (7) (West Supp. 1995) constitutes punishment for purposes of the Eighth Amendment's Excessive Fines Clause. *Austin*, 113 S.Ct. at 2806. However, rather than focusing, as the Court had done in *Halper*, on the goals of the sanction in the individual case, the *Austin* Court reasoned that in the forfeiture context it made more sense to focus on the forfeiture statute as a whole because "[t]he value of the conveyances and real property forfeitable under §§881(a)(4) and (a)(7), . . . vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Austin*, 113

S.Ct. at 2812 n. 14. *See also Kurth Ranch*, 114 S.Ct. at 1948 (focusing on goals of tax statute as a whole). The Court concluded that forfeitures under §§881(a)(4) and (a)(7) are properly considered punishment because: nothing in the sections contradicts the historical understanding of forfeiture as imposing punishment; the sections focus on the owner's culpability by providing for the "innocent owner" defense and by tying forfeiture directly to the commission of drug offenses; and Congress understood the sections as serving the goals of deterrence and punishment. *Austin,* 113 S.Ct. at 2810-11.

Thus, we know from *Halper* and *Kurth Ranch* that a civil sanction can constitute punishment for double jeopardy purposes and that the proper focus is whether a civil sanction is punitive in nature. Moreover, we know from *Austin* that civil forfeiture pursuant to 21 U.S.C.A. §§881(a)(4) and (a)(7) is punishment for purposes of the Excessive Fines Clause.

The Supreme Court's holding in *Austin* that forfeiture pursuant to §881(a)(4) and (a)(7) constitutes punishment is controlling for purposes of §881(a)(6) (dealing with monies, negotiable instruments, and securities), the section at issue in this case.[1] The *Austin* Court's historical analysis of forfeiture as

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[1]The following items are subject to forfeiture under §881(a)(6):

> All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall

punishment and its reliance on the legislative history of §881 are equally applicable in the instant case. Moreover, like the sections of the forfeiture statute at issue in *Austin,* § 881(a)(6) also includes an innocent owner defense, which focuses on the culpability of the owner in a way that makes it look more like punishment. *See Austin*, 113 S.Ct. at 2810-11. Section 881(a)(6)'s conditioning of forfeiture on a violation of the Controlled Substances Act is also indicative of Congress' punitive intent. *See id.* at 2811.

Further, the legislative history of §881(a)(6) evidences Congress's intent to punish and to deter. Senator Culver, a sponsor of the legislation, said it would "provide the United States with strong new weapons to . . . strike at the profits of illegal drug trafficking." 124 Cong. Rec. S17644 (Oct. 7, 1978). Senator Nunn, also a sponsor of the legislation, explained that "[t]he criminal justice system can only be effective if there is a meaningful deterrent. It is important that the offender be aware of the risk he is running." 124 Cong. Rec. S11965 (July 27, 1978). "We cannot forget that profit, astronomical profit, is the base motivation of drug traffickers." *Id.* By "striking out against the profits from illicit drug trafficking" the enactment of §661(a)(6) would enhance "the

---

> be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C.A. § 881(a)(6) (West 1981).

punitive and deterrent purposes of the Controlled Substances Act," which would then "have greater impact *on drug* trafficking." *Id.*

The specific holding in *Austin* is that civil forfeiture constitutes punishment for purposes of the Excessive Fines Clause. In contrast, this case involves a claim under the Double Jeopardy Clause, yet I believe that *Austin* is controlling for double jeopardy claims as well. Significantly, in *Austin* the Supreme Court relied on *Halper*, which involved the Double Jeopardy Clause, to decide whether a civil sanction constituted punishment for purposes of the Excessive Fines Clause. *See* 1 David B. Smith, I ¶ 12.10[2], at 12-136 (1994) ("The Supreme Court's decision in *Austin v. United States*, makes it clear that *Halper's* double jeopardy protections do apply to the vast majority of civil forfeiture cases.").

Recently, the Ninth Circuit similarly relied on *Austin* and *Halper* in holding that civil forfeiture pursuant to 21 U.S.C.A. §881(a)(6) constitutes punishment which triggers the protections of the Double Jeopardy Clause. *United States v. $405,089.23 United States Currency*, 33 F.3d 1210 (9th Cir. 1994), *opinion amended on denial of rehearing*, 56 F.3d 41 (9th Cir. 1995). *Cf. United States v. Ursery*, ___F.3d___, No. 94-1127, 1995 WL 411189 (6th Cir. July 13, 1995) (holding that civil forfeiture pursuant to §881(a)(7) followed by criminal conviction for the same offense constituted double jeopardy). The Ninth Circuit reasoned that:

> the only fair reading of the Court's decision in *Austin* is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the *Halper*

> criteria, it constitutes 'punishment' for purposes of both clauses.

33 F.3d at 1219. Thus, the court held that the government violated the Double Jeopardy Clause by obtaining criminal convictions against the defendant and then continuing to pursue the forfeiture action. The court concluded by discussing the practical effect of *Austin* on the government's prosecution of cases:

> Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding - that is, the same indictment - the government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If, in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it 'will have to rely to a much greater extent on criminal forfeiture.' It is entirely reasonable to put the government to this choice. After *Austin*, the law requires it.

33 F.3d at 1222 (citation omitted). I find the Ninth Circuit's reasoning persuasive.

The government counters that under *Austin* only civil forfeitures that are found to be excessive are to be considered punishment. However, the government misstates the holding in *Austin*. *Austin* holds that all forfeitures under §§881(a)(4) and (a)(7) are meant in part to punish and therefore can run afoul of

the Excessive Fines Clause. *Austin*, 113 S.Ct. at 2812. The *Austin* court left the issue of whether the forfeiture was constitutionally excessive to the district court in the first instance. *Id.*

The government also contends that application of *Halper's* "rational-relation" test--whether the amount of the sanction appears to be rationally related to the damages caused by the wrongful conduct of the defendant--results in the conclusion that the instant forfeiture of defendant's property does not constitute punishment. However, in *Austin*, the Supreme Court found that the "rational-relation" test was inapplicable in the forfeiture setting, and instead, looked to the purpose behind the forfeiture statute itself, concluding that forfeiture serves in part to punish. 113 S.Ct. at 2812 n.14. I agree that in the forfeiture context it does not make sense to compare the amount seized with the government's damages and actual costs; the value of the property seized is purely fortuitous, and thus "any relationship between the Government's actual costs and the amount of the sanction is merely coincidental." *Austin,* 113 S.Ct. at 2811-12, 2812 n.14. Moreover, the government has failed to demonstrate on the record how the forfeited property relates to its cost of investigation and prosecution of defendant's case.

Finally, the government argues that to the extent that the forfeiture in the instant case can be considered punishment, it is punishment imposed against the property itself and not against the owner of the property. However, the Supreme Court in *Austin* stressed that it has consistently recognized that *in rem* forfeiture serves, at least in part, to punish the owner. 113 S.Ct. at 2810. Moreover, the Court made clear that forfeiture of property such as cars and real estate under the current forfeiture statute is dependent not on the criminal nature of the property, but on the illegal use their owners make of them. *Austin,* 113

S.Ct. at 2810-11. The same reasoning applies to monies forfeited under §881(a)(6). Therefore, it is the owners who are punished by the forfeiture of such property. *Id.* at 2811.

The Supreme Court in *Halper* addressed the question of what constitutes punishment for purposes of the Double Jeopardy Clause. 490 U.S. at 436. The *Halper* Court announced that the proper inquiry is whether the sanction serves the goals of punishment, i.e. retribution or deterrence. *Id.* at 448. In *Austin,* the Court held that Congress intended for the forfeiture of property pursuant to §§ 881(a)(4) and (a)(7) to deter and to punish. *See Austin*, 113 S.Ct. at 2811. Similarly, for reasons previously discussed, §881(a)(6) was intended to deter and to punish. Therefore, I conclude that forfeiture pursuant to §881(a)(6) constitutes punishment for purposes of the Double Jeopardy Clause.

III.

Having decided that forfeiture pursuant to 21 U.S.C.A. §881(a)(6) constitutes punishment for purposes of the Double Jeopardy Clause, I turn to the question of whether the sequence of the proceedings makes a constitutional difference. In all of the Supreme Court cases previously discussed, the criminal sanction preceded the civil sanction and thus it is the second, civil sanction that has been barred under the Double Jeopardy Clause. By contrast, in the instant case defendant asks us to apply the Double Jeopardy Clause to bar his criminal prosecution.

The Court noted in *Kurth Ranch* that the statute at issue did not raise the question of whether a civil proceeding which is designed to inflict punishment may bar a subsequent criminal proceeding. 114 S.Ct. at 1947 n.21. In his dissent, Justice

SCALIA warned that, although the majority confronted the relatively easy task of disallowing a civil penalty after a criminal sanction already had been imposed, cases in which criminal penalties are at stake will demand much more of courts. *Id.* at 1958-59 (SCALIA, J. dissenting). Justice SCALIA opined that the order of punishment cannot possibly make a constitutional difference. *Id.* at 1958. I agree.

There is no reason why the sequence of the proceedings should make a difference in this constitutional analysis. In other words, the holdings in *Halper* and *Austin* apply equally to cases in which the civil sanction precedes the criminal sanction. "[T]he labels 'criminal' and 'civil' are not of paramount importance." *Halper,* 490 U.S. at 447. Instead, the critical inquiry remains whether the proceeding constitutes punishment for double jeopardy purposes and whether the defendant is receiving or is at risk of receiving multiple punishments for the same offense. Several other circuits also have held that the order of the proceedings, civil or criminal, does not affect the double jeopardy determination. *See United States v. Furlett,* 974 F.2d 839, 843 n.2 (7th Cir. 1992); *United States v. Sanchez-Escareno,* 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied,* ___U.S.___, 113 S.Ct. 123 (1992);*United States v. Mayers,* 897 F.2d 1126, 1127 (11th Cir.), *cert. denied,* 498 U.S. 865 (1990); *cf. United States v. Ursery,* ___F.3d___, No. 94-1127, 1995 WL 411189 (6th Cir. July 13, 1995) (finding double jeopardy where civil forfeiture preceded criminal prosecution).

IV.

I next consider whether it makes a difference in the double jeopardy analysis that defendant in the instant case did not participate in the forfeiture proceedings. The district court's ruling is based on the stated rationale that "jeopardy ha[d] not

attached pursuant to the administrative forfeiture proceeding," presumably because defendant did not contest the forfeiture. *United States v. Baird,* No. 94-0215, Order, at n.1 (E.D. Pa. March 14, 1995). Similarly, the majority concludes that administrative forfeiture can *never* constitute punishment for purposes of the Double Jeopardy Clause because: (1) the property is ownerless, i.e. no one has made a claim and/or filed a cost bond, and the taking of ownerless property punishes no one; and (2) administrative forfeiture does not place in jeopardy the person whose property is so forfeited, because it does not involve a judicial proceeding.

I believe that, if a defendant can prove that he was the owner of the property seized, participation in the forfeiture proceedings is not and should not be a precondition to a claim of double jeopardy. A defendant may choose not to participate because the allegations are true, or for fear that a claim of ownership could be utilized against him in the criminal proceeding. For instance, the government alleged in this case that defendant owned the seized property and that the property was used or acquired as a result of a drug-related offense. If the allegations are true, what purpose would be served by defendant's participation in the forfeiture proceeding?

Moreover, a claim of ownership in the forfeiture proceeding conceivably could be used against defendant in the criminal proceeding. Thus, requiring defendant to participate in the forfeiture proceeding as a precondition to a double jeopardy claim would force defendant to choose between waiving his privilege against self-incrimination or waiving his right to assert a double jeopardy violation. The Supreme Court stressed in *Simmons v. United States,* 390 U.S. 377 (1968), that one constitutional right need not be surrendered in order to assert another. *Id.* at 394. In *Simmons*, the Court found that an

unconstitutional dilemma was created when defendant was required to surrender his Fifth Amendment privilege against self-incrimination in order to establish his standing to assert an arguably valid Fourth Amendment claim. *Id.* The Court resolved the dilemma by holding that: "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial." *Id.* Similarly, in the instant case, we refuse to subject defendant to such an unconstitutional dilemma by requiring him to intervene in the forfeiture proceeding in order to preserve his rights under the Double Jeopardy Clause. The issue should be whether defendant was the owner, not whether he filed a proper and timely claim of ownership in the forfeiture proceeding. He is punished if his property is forfeited, irrespective of whether or not he participated. Hence, there should be no distinction between administrative and civil forfeiture; in either instance, a defendant must establish ownership and punishment before he can claim double jeopardy. *See also* Smith, *supra*. ¶ 12.10, at 12-141 n.33.1 ("[A] rule which would require property owners to file a claim and go through the motions of contesting a civil forfeiture merely to preserve a double jeopardy issue has little to recommend it. Tens of thousands of uncontested forfeitures would soon find their way into court.").

The majority relies on *Serfass v. United States,* 420 U.S. 377 (1975), in holding that the Double Jeopardy Clause requires that defendant participate in two judicial proceedings. Maj. op. at 12 n.11. However, *Serfass*, in contrast to the instant case, did not involve a "multiple punishments" claim and does not stand for the proposition that multiple judicial proceedings are precondition to all double jeopardy claims. In this case, defendant claims that he was punished by the forfeiture of his monies and that trial on the instant indictment would subject him

to multiple punishments for the same offense. The issue is thus whether defendant is at risk of being twice punished for the same offense, not whether defendant is at risk of being twice tried.

Lastly, in *United States v. Torres,* 28 F.3d 1463 (7th Cir. 1994), the Seventh Circuit held that the administrative forfeiture of monies did not bar defendant's sentence of imprisonment. I am unpersuaded by the *Torres* decision to the extent that it holds that, unless a defendant participates in the forfeiture proceeding, he cannot claim double jeopardy. Additionally, this case is factually distinguishable from *Torres*. Defendants Torres and Olivares were arrested and their cash seized when they attempted to buy drugs from "sellers" who turned out to be federal agents. *Torres*, 28 F.3d at 1464. The monies were administratively forfeited, and subsequently defendant Torres was convicted in a separate criminal proceeding. *Id.* On appeal, Torres argued that his criminal sentence was barred by the Double Jeopardy Clause. *Id.* In rejecting Torres's double jeopardy claim, the court stressed that it was not clear who owned the forfeited funds and speculated that "perhaps he [Torres] was just a courier, making the buy on behalf of an undisclosed principal." *Id.* at 1466. In contrast, the ownership of the funds in the instant case is not honestly contested.

V.

Assuming that defendant can establish that he was the owner of the forfeited property, the *nature* of the property forfeited should affect one's ability to claim double jeopardy.

For illustrative purposes, I will divide property subject to forfeiture under §881(a) into two categories.[2]

The first category includes property which is dangerous and/or illegal *per se* and thus subject to destruction or removal from society. The forfeiture of such property cannot constitute punishment for purposes of the Double Jeopardy Clause because its forfeiture may be characterized as "remedial." This category includes:

> all controlled substances which have been manufactured, distributed, dispensed, or acquired, §(a)(1);
>
> all raw materials, products, and equipment which are used in manufacturing any controlled substance, §(a)(2);
>
> all property which is used as a container, §(a)(3);
>
> all books, records, and research, including formulas, microfilm, tapes and data which are used in violation of this subchapter, §(a)(5);
>
> all controlled substances which have been possessed in violation of this subchapter, §(a)(8);

---

[2]Moreover, we need not even consider whether confiscating property that a defendant does not have title to, i.e. stolen property, is punishment for double jeopardy purposes. We recognize that the government can immediately confiscate such property and is not required to institute forfeiture proceedings.

all listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, §(a)(9);

any drug paraphernalia, §(a)(10);

any firearm, §(a)(11).

21 U.S.C.A §881(a) (West 1983 & Supp. 1995).

The items included in the first category are either illegal *per se* and/or dangerous to society in general or to law enforcement agents in particular. The *Austin* Court conceded that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." 113 S.Ct. at 2811 (citing *United States v. One Assortment of 89 Firearms,* 465 U.S. 354 (1984), which involved forfeiture of firearms). Indeed, Congress recognized that such property is dangerous by providing for its summary forfeiture and destruction. Specifically, section 881(f)(1) (West Supp. 1995) provides that all controlled substances, all raw materials, and any equipment or container subject to forfeiture, which cannot be separated safely from such raw material or product, shall be deemed contraband and summarily forfeited to the United States. Section 881(f)(2) (West Supp. 1995) allows the government to destroy such property. *See also* H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. (1990) *reprinted in* 1990 U.S.C.C.A.N. 6472, 6506 (providing for summary forfeiture and destruction of dangerous substances and the equipment or containers from which these substances cannot be safely separated "because of the dangers they create for law enforcement agents"). Similarly, Congress provided that the selling and interstate transport of drug paraphernalia is illegal, §863(a) (West Supp. 1995), and that drug paraphernalia is

subject to seizure, forfeiture, and destruction, §863(c) (West Supp. 1995).

The second category consists of property forfeited pursuant to §§ 881(a)(4), (6), (7), such as boats, planes, cars, real property, and monies, which courts have distinguished as "derivative contraband." Derivative contraband has been defined as articles which are not inherently illegal, but are used in an unlawful manner. *See United States v. Farrell,* 606 F.2d 1341, 1344 (D.C. Cir. 1979) (monies used in drug transaction are derivative contraband). The forfeiture of such property may serve as a basis for a double jeopardy claim because, as previously discussed, the forfeiture of property pursuant to §§ 881(a)(4), (6), and (7) is punitive in nature.

VI.

Finally, I pose the question whether the *source* of the property seized should affect the determination of double jeopardy. Two scenarios illustrate my concerns: In the first scenario, a person acquires a house or car by honest means. If that property is forfeited because it is utilized in connection with criminal activity, the owner is clearly punished. Under such circumstances, a prior or subsequent criminal proceeding based on the same charges, which justified the forfeiture, would implicate double jeopardy. My concern is with the second scenario, in which a defendant acquires property by dishonest means. For instance, monies passed to a person in a drug sale are immediately seized and ultimately forfeited. I have difficulty in concluding that such forfeiture, i.e. the seizure of monies derived from an illegal transaction, bars criminal prosecution for that drug sale. I acknowledge that the monies seized technically are the property of the drug dealer, and, thus, their forfeiture constitutes punishment in the ordinary sense of the word; but I

ponder whether it does or should constitute punishment for double jeopardy purposes. The issue is further complicated if the forfeiture involves property acquired from the expenditure of monies illegally obtained--the indirect rather than the direct acquisitions of illegal activity.

Since the majority does not find double jeopardy because of the nature of the forfeiture proceeding, this distinction is not addressed. However, I find it worthy of serious consideration. Moreover, I recognize that if my distinction were to be adopted, a secondary issue would have to be resolved concerning the applicable burden of proof and where to place it.

VII.

I would vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

vs. : NO. 94-CR-0215

FRANK L. BAIRD :

ORDER

AND NOW, this 13th day of March, 1995, upon consideration of the Defendant's Motion to Dismiss on Double Jeopardy Grounds and the Government's answer thereto, it is hereby ORDERED that the Defendant's motion is DENIED.[3]

BY THE COURT:

J. CURTIS JOYNER, J.

---

[3]This Court finds that jeopardy has not attached pursuant to the administrative forfeiture proceeding and therefore we find no double jeopardy violation to preclude the Defendant from criminal trial. See *United States v. Torres*, 28 F.3d 1463, (7th Cir. 1994), cert. denied, 115 S.Ct. 669 (1994). And also *United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), cert. denied, 115 S.Ct. 573 (1994).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1202

UNITED STATES OF AMERICA

vs.

FRANK L. BAIRD,

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SAROKIN, Circuit Judges.

The petition for rehearing filed by appellant, Frank L. Baird, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Sarokin would have voted for rehearing.

BY THE COURT:

_____

Circuit Judge

Date: Sep 12 1995

STATUTES

21 U.S.C. 881(a)(4)-(7)

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that--

> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner

to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this sub-chapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Supreme Court, U.S.
FILED
DEC 18 1995
OFFICE OF THE CLERK

(2)

No. 95-630

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK L. BAIRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause requires dismissal of a pending indictment that charges petitioner with drug and firearm offenses, because of the uncontested administrative forfeiture of $2,582 that was seized from petitioner's residence.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-630

FRANK L. BAIRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 63 F.3d 1213.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1995. A petition for rehearing was denied on September 12, 1995. The petition for a writ of certiorari was filed on October 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner in

nine counts with narcotics and firearms offenses.[1] Before trial, petitioner moved to dismiss the indictment on the ground that his conviction and sentencing on the offenses it charges would violate the Double Jeopardy Clause. The district court denied the motion, and petitioner took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1a-32a.

1. On April 20, 1994, Drug Enforcement Administration (DEA) agents and local law enforcement officers executing a search warrant at petitioner's residence in Bryn Mawr, Pennsylvania, discovered a clandestine laboratory for the manufacture of 3,4 methylenedioxy-methamphetamine, a Schedule I hallucinogenic controlled substance sold on the street as "Ecstacy." The officers also discovered precursor chemicals, formulae for the manufacture of the drug, and more than 30 kilograms of "Ecstacy." Pet. App. 2a; Gov't C.A. Br. 5-6. In addition, the agents seized

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[1] Petitioner is charged with conspiracy to manufacture and distribute 3,4 methylenedioxy-methamphetamine or "Ecstacy" (a schedule I narcotic), in violation of 21 U.S.C. 846; one count of attempting to manufacture "Ecstacy," also in violation of 21 U.S.C. 846; one count of manufacturing "Ecstacy" and one count of possessing "Ecstacy" with the intent to distribute it, each in violation of 21 U.S.C. 841(a)(1); possession of "Ecstacy" with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860 (Supp. V 1993); creating a substantial risk of harm to human life while attempting to manufacture and manufacturing "Ecstacy," in violation of 21 U.S.C. 858; maintaining a place for the manufacture of "Ecstacy," in violation of 21 U.S.C. 856; attempted manufacture of amphetamine, in violation of 21 U.S.C. 846; and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1993).

$2,582 in cash that they found in petitioner's bedroom. Pet. App. 2a.

On May 27, 1994, the DEA sent petitioner a notice stating that the DEA sought the administrative forfeiture of the $2,582 seized from petitioner's residence. The notice stated that the cash and property were subject to forfeiture because they were "used or acquired as a result of a drug-related offense." The notice further stated that a claimant "may petition the DEA for the return of the property or [the claimant's] interest in it * * * and/or * * * may contest the seizure and forfeiture of the property." The notice explained the procedure for filing a claim or a petition for remission of the forfeiture and stated, in underscored words, that a "claim of ownership" to the property must be filed within 20 days of the date when the notice was first published in a newspaper of general circulation. See C.A. App. 13-15; see also Pet. App. 9a-10a.

Petitioner failed to file a claim to the seized cash. Because no claim to the property was made, on July 15, 1994, the DEA issued an administrative declaration of forfeiture for the currency. Gov't C.A. Br. 7.

2. Before the trial of the criminal charges against petitioner, he moved to dismiss the indictment. Petitioner contended that the administrative forfeiture already had "punished" him for the offenses charged in the indictment, and that the multiple punishments prong of the Double Jeopardy Clause accordingly barred his criminal conviction and sentence on those offenses. The district court denied the motion. Pet. App. 33a. The court held that "jeopardy [did] not attach[] pursuant to the administrative forfeiture proceeding." *Ibid.*

3. Petitioner took an interlocutory appeal of the district court's order, and the court of appeals affirmed. Relying on *Witte* v. *United States*, 115 S. Ct. 2199 (1995), the court first held that it had jurisdiction to hear petitioner's interlocutory appeal. Pet. App. 4a n.4. Turning to the merits, the court held that the administrative forfeiture of property does not impose punishment on anyone, because the government may obtain forfeiture only when no claim is filed to the property. Pet. App. 10a-11a. The court explained:

> Without adopting a position on the matter, we can certainly understand how a court might conclude that *civil* forfeiture under 21 U.S.C. § 881(a)(6) of drug proceeds constitutes "punishment" for double jeopardy purposes. However, we cannot fathom how an *administrative* forfeiture, under section 881(a)(6), of *unclaimed* alleged drug proceeds could possibly be held to constitute "punishment" in relation to an individual's double jeopardy claim. * * * All property administratively forfeited is, as a matter of law, "ownerless" property, and the taking of ownerless property "punishes" no one.

Ibid. (citations omitted).

The court also concluded that the administrative forfeiture of property seized from petitioner did not place him in "jeopardy" within the meaning of the Double Jeopardy Clause. Pet. App. 11a. The court held that "jeopardy does not, and cannot, attach until one is made a *party* to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence." *Id.* at 13a. Accordingly, because petitioner failed to file a claim when he received

notice of the administrative forfeiture, the court held that his conviction and sentencing on the offenses charged in the indictment would not violate the Double Jeopardy Clause. *Id.* at 13a-14a.

Judge Sarokin dissented. He argued that if petitioner could establish that he owned the forfeited cash, then the forfeiture might have imposed punishment on him, even though he had not participated in the administrative proceeding. Pet. App. 16a-32a.

ARGUMENT

Petitioner renews his contention (Pet. 6-18) that the multiple punishments prong of the Double Jeopardy Clause bars his conviction and sentencing on the offenses charged in the indictment because he was previously punished by the uncontested administrative forfeiture of the $2,582 seized from his residence. The court of appeals correctly rejected that contention, and its conclusion is in accord with the views of every court of appeals that has considered the question. Accordingly, no further review is warranted.

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that was "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that a forfeiture of certain property used to facilitate narcotics offenses, pursuant to 21 U.S.C. 881(a)(4) and

(7), constitutes "punishment" for purposes of the Excessive Fines Clause of the Eighth Amendment.

Relying on *Halper* and *Austin*, the Ninth Circuit has held that a civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. See *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), petition for cert. pending, No. 95-346 (filed Aug. 28, 1995); but see *United States* v. *Salinas*, 65 F.3d 551 (6th Cir. 1995) (forfeiture of proceeds of drug trafficking is wholly remedial and accordingly it does not inflict "punishment"); *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994) (same), cert. denied, 115 S. Ct. 573 (1995). The Fifth and Sixth Circuits have held that the forfeiture of property used to facilitate the commission of a crime, under 21 U.S.C. 881(a)(7), constitutes punishment for that crime. See *United States* v. *Perez*, No. 94-60788 (5th Cir. Nov. 21, 1995); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), petition for cert. filed, No. 95-345 (filed Aug. 28, 1995).

Petitioner's claim rests on the premise that the uncontested administrative forfeiture of the $2,582 seized from his residence likewise constitutes punishment, apparently for all of the offenses alleged in the indictment that is pending against him. Even if correct, that claim is not properly before this Court, because the court of appeals lacked jurisdiction to consider it. In *Abney* v. *United States*, 431 U.S. 651 (1977), this Court held that pretrial orders rejecting claims of former jeopardy may be raised by a defendant in an interlocutory appeal when they assert the right not to be "twice put to *trial* for the same offense." *Id.* at 661. The Court suggested, however, that a pure multiple-punishments claim, such as

petitioner raises, would not be similarly appealable, since "that aspect of the right can be fully vindicated on an appeal following final judgment." *Id.* at 660.

The court of appeals believed that a different conclusion was warranted by this Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995), which recognized that the Double Jeopardy Clause prohibits the government from "*attempting* a second time to punish criminally, for the same offense." *Id.* at 2204 (emphasis partially deleted). *Witte*, however, presented no question of appellate jurisdiction, because the district court had dismissed the indictment on double jeopardy grounds, see *id.* at 2203-2204, and the court of appeals accordingly had jurisdiction over the government's appeal under 18 U.S.C. 3731. For that reason, the passage on which the court below relied was addressed to whether the defendant's claim was premature, not whether it was appealable. The fact that a double jeopardy claim may be ripe for adjudication by a district court (as is true of many other pretrial claims a defendant may make, including suppression claims) does not mean that the court's refusal to honor the claim is immediately appealable on an interlocutory basis. Because the right not to be subject to impermissible multiple punishments can be completely vindicated on appeal from a conviction and sentence, the court of appeals erred in asserting appellate jurisdiction over petitioner's interlocutory appeal.[2]

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[2] The courts of appeals are divided over the issue of appealability. Compare *United States* v. *Ramirez-Burgos*, 44 F.3d 17, 18-19 (1st Cir. 1995) (finding no right of interlocutory appeal for multiple punishments claim), with Pet. App. 4a n.4 (finding right of appeal); *United States* v. *Perez*, No. 94-60788

2. In any event, petitioner's double jeopardy claim is unfounded. The uncontested administrative forfeiture in this case did not inflict "punishment" on petitioner. And because petitioner did not claim ownership of the cash in the administrative proceeding, he was not placed in "jeopardy" in that proceeding.

Every court of appeals that has considered the issue has held that an administrative forfeiture does not constitute "punishment" for double jeopardy purposes. See *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994). Like the court of appeals in this case, those courts have recognized that administrative procedures may be used only to obtain the forfeiture of unclaimed property.[3] Thus, when the government

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(5th Cir. Nov. 21, 1995) (same); *United States* v. *Chick*, 61 F.3d 682, 684-686 (9th Cir. 1995) (same).

[3] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621 (1988 & Supp. V 1993), provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an *in rem* complaint against the property and publishes notice of the

gives notice that it intends to forfeit property, and the purported owner fails to take any step to establish his interest in the property, the government may consider the property abandoned or ownerless. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishe[s] no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on a person who fails to establish an interest in the forfeited property).

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. In the absence of either the imposition of punishment or some participation in a proceeding aimed at imposing punishment, a person has not been placed in "jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *Arreola-Ramos*, 60 F.3d at 192-193 ("As Arreola did not appear and contest the forfeiture, he was never in jeopardy"); *United States* v. *Torres*,

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forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims. In a judicial forfeiture, a claimant may challenge the government's right to obtain forfeiture and raise an innocent owner defense.

28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioner's failure to file a claim therefore precludes a finding that he was in jeopardy or suffered punishment in the administrative forfeiture.

Indeed, petitioner's failure to file a claim also constitutes a waiver of any rights he might have had under the Double Jeopardy Clause. As this Court has held, "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). When a defendant makes a deliberate choice "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused," he cannot claim that he suffered a violation of the Double Jeopardy Clause in subsequent proceedings. *Ibid.*; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). Moreover, as the Court reiterated in *Halper*, the Double Jeopardy Clause provides an "intrinsically personal" constitutional protection and thus a defendant must show that his rights under the Clause have been violated. *Halper*, 490 U.S. at 447. By declining to file a claim to the seized cash, petitioner avoided becoming a party to the administrative forfeiture. Thus, he cannot now claim that the administrative forfeiture resulted in a violation of his personal rights under the Double Jeopardy Clause.[4]

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[4] Even if petitioner had suffered punishment by the administrative forfeiture of the seized cash, he would not be entitled to dismissal of the indictment. The Double Jeopardy

3. There is no reason to hold this case pending the disposition of the government's petitions for certiorari in *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346. In our petition in *$405,089.23*, we seek review of the Ninth Circuit's conclusion that civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a) (1988 & Supp. V 1993) invariably constitutes punishment under the Double Jeopardy Clause. Similarly, our petition in *Ursery* challenges the Sixth Circuit's holding that the forfeiture of property used to facilitate a crime always amounts to punishment for double jeopardy purposes. Both petitions argue that the forfeitures at issue do not necessarily constitute punishment, that parallel civil forfeiture and criminal proceedings are not separate proceedings for purposes of the multiple punishments prong of the Double Jeopardy Clause, and that civil forfeiture and the criminal offense on which it rests are not the "same offense" under the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in the *Ursery* and *$405,089.23* petitions would provide additional grounds for rejecting petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with a ground for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture pro-

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Clause prohibits the imposition of multiple punishments only for the "same offense" and only in separate proceedings. See *Halper*, 490 U.S. at 450; see also *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Petitioner does not explain how the forfeiture of a relatively modest sum of money can constitute punishment for every offense in a nine-count indictment.

ceedings, has squarely rejected a claim identical to petitioner's, in an opinion written by the author of the Ninth Circuit's decision in *$405,089.23*. See *United States* v. *Cretacci*, *supra*. And the court of appeals in this case explicitly differentiated between civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6), of which it said that it could "certainly understand how a court might conclude that * * * [such forfeiture] constitutes 'punishment,'" and the uncontested administrative forfeiture involved here, which it could not "fathom" how a court could regard as punishment. Pet. App. 10a. Accordingly, if the Court grants certiorari in *Ursery* and *$405,089.23* and decides those cases adversely to the government, they will have no effect on the validity of the court of appeals' reasoning in this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995

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[5] Moreover, in light of the court of appeals' error in asserting jurisdiction over this interlocutory appeal (see pages 6-7, *supra*), a remand to that court for further consideration of petitioner's claims would be especially inappropriate.